

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35653(KRH)  
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.  
CIRCUIT CITY STORES . 701 East Broad Street  
INC., . Richmond, VA 23219  
.  
.  
Debtor. . March 13, 2009  
. . . . . 12:12 p.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY COURT JUDGE

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WITNESS FOR THE DEBTOR

JAMES AVALLONE

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1 THE CLERK: In the matter of Circuit City Stores,  
2 Incorporated. Hearings on Items 1 through 3, as set out on  
3 debtors' amended agenda.

4 MR. FOLEY: Good afternoon, Your Honor. Doug Foley  
5 with McGuireWoods on behalf of debtor. With me at counsel  
6 table is Ian Fredericks from Skadden Arps. Also with me in the  
7 courtroom today is Sarah Boehm from our firm and Michelle  
8 Mosier who's the CFO of the company, Your Honor.

9 Your Honor, our agenda today, although it's brief, we  
10 do have a few matters to cover. Items Number 1 and 2 I'll be  
11 addressing with the Court. Items Number 3 and the objections  
12 will be addressed by Mr. Fredericks and the various landlord  
13 counsel that are in the courtroom today.

14 Your Honor, Items Number 1 and 2, if Your Honor  
15 recalls, involve the matters relating to Plum Choice. There  
16 were two motions filed by Plum Choice, one for relief from the  
17 automatic stay and one to compel payment of an administrative  
18 claim. We have reached a settlement with Plum Choice and we  
19 have actually documented that settlement. It is subject to  
20 committee review and non-objection to that. Their next meeting  
21 is next Wednesday the 18th. And based upon my conversations  
22 with counsel for the Committee this morning, they are prepared  
23 to make that recommendation to not object to this settlement  
24 and stipulation and order that we intend to present to Your  
25 Honor after we have that confirmation.

1 But, just to summarize basically what the terms of  
2 this resolution are, Your Honor, we were parties to multiple  
3 agreements with Plum Choice. One was called the Dispatch  
4 Agreement in which Plum Choice agreed to perform certain  
5 telephone dispatch support and scheduling services to Circuit  
6 City's home theater, installation, home delivery and personal  
7 services -- personal computer service business units. That was  
8 one agreement, dispatch agreement.

9 We were also parties to the remote services agreement  
10 in which we provided -- Plum Choice provided online remote  
11 diagnostic services to customers of Circuit City's Firedog  
12 technical support services throughout the United States and its  
13 territories.

14 The third agreement, Your Honor, that we are parties  
15 to with Plum Choice is called the PTS Services Agreement, which  
16 is essentially a subcontract relating to the Verizon  
17 relationship that we had in which in order to fill our  
18 obligation to Verizon, the Verizon contract, Plum Choice was  
19 fulfilling our remote technical services obligations and sales  
20 support obligations under the Verizon Prime contract. Your  
21 Honor, when the Verizon Prime contract was terminated at the  
22 end of last year, that sort of set in motion a lot of issues  
23 relating to Plum Choice that we have through negotiations with  
24 counsel, have resolved, but there were several claims asserted.  
25 One is their pre-petition claim in the approximate amount of

1 \$1.8 million. And then they asserted four post-petition  
2 claims, one under the services agreement for approximately \$1.1  
3 million, one under -- two under the PTS services agreement, one  
4 called the wind down claim we refer to in the stipulation in  
5 the amount of approximately \$808,000, and the infrastructure  
6 claim in the amount of \$1.8 million. And under the dispatch  
7 agreement they asserted a claim of \$43,000 for additional  
8 amounts that they say were damages caused from the basically  
9 deconstruction of the Verizon contract. All of these amounts  
10 were asserted to be administrative priority and we're asking  
11 for payment for that.

12           Your Honor, we also happen, as part of our  
13 arrangement with Plum Choice, we own -- Circuit City owns  
14 approximately 14 percent of the capital stock of Plum Choice,  
15 which is subject to a right of first refusal and co-sale  
16 agreement under which, if we were ever offered, we offered the  
17 stock to a third party, they would be able to match it at  
18 whatever that price is. So, what we've constructed, Your  
19 Honor, is we've reconciled the amounts owed through the end of  
20 December under the services agreement and we've agreed on a  
21 number with respect to that and that number is \$1,062,834.84.  
22 And that will be paid upon entry of a final order, within three  
23 days of entry of a final, non-appealable order.

24           Your Honor, Plum Choice has also agreed to waive all  
25 of their administrative claims that they have asserted in

1 exchange for our return to them of the capital stock that we  
2 own in Plum Choice.

3 Your Honor, we've also agreed to preserve whatever  
4 rights they have to assert their pre-petition, general  
5 unsecured claim and our rights to object to the same, as well  
6 as any avoidance actions or Chapter 5 claims that we might have  
7 against them.

8 But, in sum and substance, that's the essence of the  
9 settlement. We've, again, discussed all the details and the  
10 rationale for it with the Committee. Committee counsel is  
11 prepared to recommend that to the Committee at their next  
12 meeting, which is next Wednesday. We would like, again, being  
13 optimistic, that the Committee will not object to the terms of  
14 the settlement to be able to take these matters off the docket,  
15 and then once we receive confirmation that the Committee does  
16 not object to the terms of the settlement, submit the  
17 stipulation and order for entry.

18 THE COURT: That will be approved and the motions  
19 will be resolved as you've set forth on the record.

20 MR. FOLEY: Thank you, Your Honor.

21 MR. SAVENKO: Your Honor, may I just -- Troy Savenko,  
22 enter an appearance on the record for PlumChoice and agree with  
23 everything that Mr. Foley's represented.

24 THE COURT: All right. Thank you, Mr. Savenko.

25 MR. FOLEY: Your Honor, that resolves Items 1 and 2.



1 That leaves Item 3 on the docket, Your Honor.

2 THE COURT: All right. Thank you.

3 MR. FREDERICKS: Good morning, Your Honor. Ian  
4 Fredericks of Skadden, Arps, Slate, Meagher and Flom, LLP. We  
5 are here today on the debtors' motion to establish lease and  
6 bidding procedures and ultimately approve the sale of certain  
7 leases of unexpired -- or unexpired leases of real property.  
8 For the record today, Your Honor, I have both Michelle Mosier,  
9 who is the principal financial officer, as well as the vice  
10 president and comptroller of Circuit City, and I also have Jim  
11 Avallone, a senior managing director of DJM Realty. At a point  
12 during this presentation I will ask the Court whether or not  
13 it's acceptable to proffer their testimony. I just wanted to  
14 let you know they're both present in the courtroom at this  
15 point.

16 By way of background, we originally came before the  
17 Court on February 13th to seek approval to establish the lease  
18 bidding and rejection procedures. We dealt with one aspect of  
19 this, I believe -- the procedures were set up such that leases  
20 were broken down into kind of two categories. There were  
21 leases we would receive bids on in February, and there were  
22 leases we would receive bids on in March. Other than perhaps  
23 one or two bids from landlords for February leases, there were  
24 no other leases that were marketed during that period that the  
25 debtors were able to receive bids on. For the March leases,

1 the bid deadline was originally set as March 5th at 4 p.m. As  
2 you may recall from the last hearing, we asked Your Honor -- or  
3 I believe it was the February 25th hearing -- we asked Your  
4 Honor to move up that deadline after consultation with DJM and  
5 the Committee to March 3rd, but the debtors could agree to  
6 extend that deadline before or after it expired on a  
7 case-by-case basis.

8 With that short presentation, I guess I would at this  
9 point like to ask if it's acceptable to proffer the testimony  
10 of Michelle Mosier and Jim Avallone.

11 THE COURT: You may.

12 MR. FREDERICKS: Ms. Mosier and Mr. Avallone would  
13 testify that on or before March 3rd, 2009, at 4 p.m., the  
14 debtors received various bids for various March leases.  
15 Approximately three-quarters of those bids were received from  
16 landlords bidding on their own leases and the other quarter  
17 were from third parties. They would further testify that also  
18 before and after the March 3rd deadline, the debtors received  
19 requests from certain parties interested in bidding on leases  
20 and granted requests -- or, to extend the bid deadline and  
21 granted requests on a case-by-case basis. I believe all  
22 requests were granted and the outside date was March 5th, 2009  
23 at 4 p.m. On or before that deadline the debtors received some  
24 additional bids.

25 Thereafter, in consultation with the Committee, DJM

1 the debtors, determined which bids constituted the highest or  
2 otherwise best bids for purposes of starting an auction, and on  
3 March 10th, the debtors held an auction.

4           They would further testify that during the auction  
5 there was active bidding on approximately four locations. The  
6 remainder of the locations -- two of the locations were -- I'm  
7 sorry -- one of the locations was withdrawn at the auction  
8 because the debtors determined that the bid was not an  
9 acceptable bid given the circumstances and desire to re-market  
10 that particular lease. All of the landlord bids were accepted  
11 as the highest or otherwise best bid presented at the auction,  
12 with one caveat. All of those, and they would testify that  
13 with respect to all of those, those were the highest or  
14 otherwise best bids presented at the auction. They would  
15 further testify that with respect to locations -- I actually  
16 have a chart if it's okay if I hand it up to Your Honor?

17           THE COURT: Yes.

18           MR. FREDERICKS: I guess I would like to mark this  
19 chart as Exhibit A. This was the notice of auction results  
20 that was put on KCC's website following the auction.

21           THE COURT: Does any party in the courtroom have any  
22 objection to this being received as Exhibit A?

23           (No audible response).

24           THE COURT: Okay. It is received.

25           MR. FREDERICKS: With respect to Store Number 854,

1 Ms. Mosier and Mr. Avallone would testify that there was active  
2 bidding on this particular location and that ultimately  
3 Vanguard Management Services presented the highest or otherwise  
4 best bid, which was a bid in the amount of \$435,000. They  
5 would further testify that with respect to Store Number 3561  
6 this was one bid that was -- this was a situation where one bid  
7 had been presented by Best Buy Stores, Inc. The landlord did  
8 not bid on this particular location. Best Buy bid the final  
9 cure amount as determined by the Court or agreement of the  
10 parties and that bid was accepted as the highest or otherwise  
11 best bid.

12           They would further testify that with respect to Store  
13 Number 3663, which is the Gateway Mini Superstore, there was  
14 very active bidding between both Best Buy and P.C. Richard &  
15 Son, Inc. On this particular location at the conclusion of the  
16 auction, the highest or otherwise best bid was ten and a half  
17 million dollars, and that was presented by Best Buy Stores,  
18 Inc.

19           They would further testify that with respect to Store  
20 Number 3669 this was a location where P.C. Richard & Son, Inc.,  
21 was the only bidder for this particular location and that this  
22 location was -- the bid price was \$100,000. With respect to  
23 Store Number 3670, again, P.C. Richard & Son was the only  
24 bidder on this particular location. After negotiations with  
25 the debtors, the parties agreed that this particular bid would

1 be increased from 100,000 to 110,000.

2 With respect to Store Number 3679, this was a  
3 situation where the landlord had credit bid its cure out at the  
4 particular time, and other parties had also submitted bids on  
5 this particular location. At the conclusion of the auction,  
6 the landlord presented the highest or otherwise best bid which  
7 resulted in total consideration of \$470,000, a piece of which  
8 will be the cure amount and the remainder of which will be in  
9 cash consideration.

10 Later on in the presentation I'll address how we're  
11 going to deal with the cure amounts. But, suffice it to say  
12 that will be the difference between the cure amount as agreed,  
13 or the Court, and \$470,000 be paid by them as cash  
14 consideration.

15 With respect to Store Number 3690, P.C. Richard & Son  
16 again was the only bidder on this particular location, and for  
17 this location they bid \$250,000. With respect to 3692, again,  
18 P.C. Richard & Son was the only bidder, and on this particular  
19 location the bid was \$100,000.

20 With respect to 3692 -- I'm sorry -- 3697, this was a  
21 location where the debtors had received multiple bids. After  
22 competitive bidding at the auction ultimately the highest or  
23 otherwise best bid was presented by P.C. Richard & Son in the  
24 amount of \$3.3 million.

25 For all of the other locations, except for Store

1 Number 805, at the auction the debtors determined that this bid  
2 was the highest or otherwise best bid presented at the auction  
3 in accordance with the bid procedures and the reservations that  
4 were put on the record at the auction. Following the auction  
5 the debtors determined that that bid was simply inadequate to  
6 proceed forward with at this hearing, so they withdrew that  
7 lease from consideration. I believe that there is an objection  
8 pending today on that and I think we can address that later,  
9 but after both Ms. Mosier and Mr. Avallone would testify that  
10 with respect to that location the bid was simply inadequate.

11 With respect to Store Number 3699 and 4305, the  
12 debtors have agreed to adjourn that until the March 20th  
13 hearing. And the landlords have agreed to waive claims beyond  
14 today until the Court ultimately approves or otherwise disposes  
15 of those two locations.

16 With respect to all the remaining locations that the  
17 debtors are going forward with, Ms. Mosier and Mr. Avallone  
18 will testify that the bids presented were the highest or  
19 otherwise best bids, that the leases were marketed in  
20 accordance with the bidding procedures, that the auction was  
21 conducted in accordance with the bidding procedures, that the  
22 debtors consulted with the Committee at various aspects of the  
23 process, including during the auction, and ultimately consulted  
24 with the Committee on which they had presented the highest or  
25 otherwise best bid.

1           The debtors would testify that with respect to these  
2 parties, the debtors have negotiated with the bidders in good  
3 faith, there has been no collusion. That the parties should be  
4 entitled to the protections under both 363(m) and 363(n), and  
5 that approval of the motion with respect to Location Number 375  
6 -- or 852, 854, 859, 3150, 3203, 3207, 3343, 3549, 3561, 3563,  
7 3669, 3670, 3679, 3690, 3692, 3697 and 3682(a) -- let me just  
8 make sure I got that -- are in the best interest of the estate,  
9 should be approved based on an exercise of the debtors'  
10 business judgment. And with that, that would conclude the  
11 proffers of those particular two instances, and I would move to  
12 admit Exhibit A into evidence.

13           THE COURT: I don't see 3682(a) on the chart that  
14 you've tendered to the Court. Is that --

15           MR. FREDERICKS: It's the last location, it's out of  
16 order. I apologize. It's at the bottom.

17           THE COURT: I see it. Very good, thank you. Does  
18 any party wish to examine either of these two witnesses?

19           (No audible response).

20           THE COURT: All right, the proffer will be accepted.

21           MR. FREDERICKS: Okay. Additionally, Your Honor, I  
22 have here a transcript of the results of the auction, and at  
23 this time I would -- there was a court reporter present at the  
24 auction, and at this time I would move the admission of the  
25 transcript into evidence.

1 THE COURT: Any objection? Okay, it will be received  
2 as Exhibit B.

3 MR. FREDERICKS: Exhibit B. Thank you, Your Honor.

4 With that, Your Honor, I think it probably makes  
5 sense to proceed, I guess, in two ways. First, there were some  
6 objections to the motion relating to rejection of certain  
7 leases. With respect to those objections, with some of the  
8 objectors we agreed prior to the hearing to adjourn until March  
9 20th. We would propose adjourning the remainder of them until  
10 March 20th, try to work them out. To the extent they can't be  
11 worked out, we'd come back on the 20th. And unless a party has  
12 an objection or the Court has an objection, we'd like to  
13 proceed that way.

14 THE COURT: That will be fine. Just so that we have  
15 it on the record, which objections now are we adjourning under  
16 that procedure? You've got them listed in your proposed agenda  
17 A through Q.

18 MR. FREDERICKS: This would be letter E.

19 THE COURT: All right. So, that E will be continued  
20 to the 20th.

21 MR. FREDERICKS: This would be letter H, and this  
22 would be letter M.

23 THE COURT: All right. And that's with the consent  
24 of those -- or do you wish to be heard on that, sir?

25 UNIDENTIFIED SPEAKER: I didn't understand. Did you



1 say M as in Mike or N as in November for the last one?

2 MR. FREDERICKS: M as in Mike.

3 UNIDENTIFIED SPEAKER: Thank you.

4 THE COURT: All right. Thank you. Mr. Epps, do you  
5 wish to be heard with regard to this?

6 MR. EPPS: Your Honor, with regard to Objection M --  
7 A.C. Epps Jr., on behalf of Glimcher Properties -- and Mr.  
8 Fredericks' suggestion is perfectly acceptable. Thank you.

9 THE COURT: All right, very good. Ms. Pierro?

10 MS. PIERRO: Kimberly Pierro on behalf of the Cole  
11 Landlords. Under Subsection (8), we have no objection to  
12 continuing this to March 20th to try and work it out.

13 THE COURT: All right. Thank you.

14 MR. GOLDMAN: Good afternoon, Your Honor. Neil  
15 Goldman for TSA Stores, which is Item E. We have no objection  
16 to continuing to the 20th. I would only note that I have not  
17 -- I didn't get contact from debtors' counsel and would have  
18 preferred to have heard from them about the request. But, we  
19 have no objection.

20 THE COURT: All right, very good. Thank you.

21 MR. FREDERICKS: I apologize for that, Your Honor.  
22 The debtors could go -- I mean, the debtors are prepared to go  
23 forward today, you know, if he wants to. It's been a very  
24 hectic couple of days dealing with the assumption of  
25 assignments and I apologize to counsel. If he'd prefer to go

1 forward today, we can do so at the end of the hearing. It's  
2 entirely up to him.

3 THE COURT: Mr. Goldman, since you are here today and  
4 have been inconvenienced in that regard, if you want to proceed  
5 on your objection today, the Court will be pleased to take it  
6 up. If you would prefer to have it continued to the 20th to  
7 try to work it out though, the Court will continue it. I'll  
8 leave that up to you.

9 MR. GOLDMAN: I'm willing to continue it, Your Honor.

10 THE COURT: All right, thank you, sir.

11 MR. FREDERICKS: And again, my apologies to the Court  
12 and to Mr. Goldman regarding not contacting him prior to the  
13 hearing.

14 THE COURT: Mr. Mueller?

15 MR. MUELLER: Good morning -- or, good afternoon,  
16 Your Honor. Mike Miller on behalf of Carousel Center  
17 Superstore with respect to this particular proceeding right  
18 now. I was not sure. Is 3150 being continued to the 20th? Is  
19 that one of the stores that's being continued to the 20th?

20 THE COURT: Right now we're only dealing with the  
21 objection of TSA Stores, the objection of Cole, Taunton  
22 (phonetic) and the unlimited objection of Glimcher Properties.

23 MR. MUELLER: All right. The reason I ask, Your  
24 Honor -- and perhaps I can just have a second with Mr.  
25 Fredericks.

1 (Off the record conversation)

2 MR. MUELLER: I apologize, Your Honor. Thank you.

3 THE COURT: All right. Thank you. All right, so,  
4 Mr. Fredericks, then what we've done is we've resolved on the  
5 objections E, H and M by continuing each of those matters to  
6 the Court's 20th, March 20 docket.

7 MR. FREDERICKS: Yes, Your Honor, that's correct.

8 THE COURT: All right.

9 MR. FREDERICKS: Okay. Turning to, I guess matter A  
10 first. Well, let me, I guess, give a little bit of background  
11 of the way that we're trying to do this with the particular  
12 orders. What we've done in the order is set up a procedure to  
13 address the cure objections. As I understand it, there are no  
14 objections, and I'm sure someone will correct me if I'm wrong,  
15 there are no objections to adequate assurance of performance  
16 for the bidders that are non-landlord bidders. So for those  
17 particular locations I believe the only issues, if there are  
18 any, are issues with respect to cures. And I believe those are  
19 the objections that are pending before this Court.

20 What we have set up in the order to do is what I've  
21 seen is fairly typical in these types of orders is to set up an  
22 undisputed and a disputed cure amount and to pay the undisputed  
23 cure amount within a specific number of days -- in this  
24 instance, five business days -- to the landlord, and to set up  
25 an escrow with the undisputed piece, which will be released to

1 either the debtors or the landlord after agreement of the  
2 parties or resolution or an order of the Court, a final order  
3 of the Court.

4           So, that's why these are all listed as status  
5 conferences. Today we'd propose to go forward on -- the 20th  
6 is the day that we would propose. I don't believe we got an  
7 opportunity speak with all the landlords about whether or not  
8 that date works for them. We're happy to negotiate a date  
9 that's mutually acceptable. If the 20th works, we'd like to  
10 use that particular date.

11           So, those are the objections I think that we're  
12 dealing with here today. The way that the order is set up is  
13 that the order -- that upon entry of the order, the debtors are  
14 deemed to have cured their obligations in accordance with  
15 paying this undisputed amount within five days and paying the  
16 undisputed, or escrowing the undisputed amount within five  
17 days. That cure -- with that, the debtors are released from  
18 any further liability and the landlord can't go back against  
19 the assignee for any liability. Because that's effective on  
20 the entry of the order and the debtors, and yet the debtors  
21 aren't paying or escrowing until five days thereafter, we have  
22 put in a provision that provides that a landlord can come back  
23 and enforce the rights to the extent the debtors don't comply  
24 with those particular obligations, they can enforce those  
25 obligations against the debtors.

1           The debtors have every reason to believe they will be  
2 able to comply with those, but that's just to make it so that  
3 we can close with these particular assignees, the assignment  
4 can be effective as of the date of the closing and you know,  
5 all defaults are cured under the lease, et cetera. So that's  
6 the way that we've structured it in the particular order.

7           Now with respect to most of these agreements --

8           THE COURT: You're saying particular order. You  
9 anticipate a separate order for each one of these locations?

10           MR. FREDERICKS: Yes. And for -- the way we've done  
11 it is, some landlords have asked for termination agreements,  
12 some landlords have asked for assumption and assignment  
13 agreements to their designee, so we're doing a separate order  
14 with respect to each one of these particular locations, and  
15 then with the assignees that are taking, the third party  
16 assignees, we've also done separate orders with those. For the  
17 most part, we have -- we circulated all those orders either  
18 Wednesday, late Wednesday night or early Thursday morning, with  
19 the exception of one particular landlord and I'm sure we will  
20 address this here today, too. Every landlord has gotten back  
21 to us with comments to the extent they have any, and I believe  
22 with a few exceptions we have arrived on final language with  
23 respect to the termination agreements and with respect to the  
24 proposed forms of order. To the extent that we haven't yet,  
25 we'll continue to negotiate with those parties following the

1 hearing and hopefully arrive at a consensual resolution on  
2 language in those particular agreements and those particular  
3 orders.

4 With respect to -- so I guess with that, Your Honor,  
5 I would turn it over to the objectors and their particular  
6 objections and I think we can address them on a one off basis.

7 THE COURT: All right. And this applies then to all  
8 of the other lettered objections that are on the docket for  
9 matter Number 3?

10 MR. FREDERICKS: Yes. The first objection is the  
11 objection of Madison Waldorf, LLC, Objection Letter A. I don't  
12 know if counsel's here or not.

13 THE COURT: All right. Does anybody wish to be heard  
14 in connection with the objection of Madison Waldorf?

15 MR. EPPS: Your Honor, can we have a moment with Mr.  
16 Fredericks?

17 THE COURT: Yes.

18 (Off the record conversation)

19 MR. FREDERICKS: I think that what -- if there's no  
20 objection or if they're not here pressing the objection, we're  
21 certainly not moving forward to resolve their cure today. I'll  
22 communicate with counsel to see whether or not the 20th works.  
23 And if it doesn't work, we'll agree on another date.

24 THE COURT: All right. So, as I understand it then,  
25 with regard to Item A, I'm approving -- you're asking me to

1 approve the assumption and assignment of this lease with the  
2 understanding that you will cure the undisputed portion of the  
3 cure amount within five days.

4 MR. FREDERICKS: Yes.

5 THE COURT: And that the disputed portion of the cure  
6 amount is going to be set down for a hearing on March 20 to  
7 address that. But, if that time is inconvenient, that you'll  
8 set it for another time with the counsel with the landlord to  
9 address the disputed amount of the cure amount, that the  
10 disputed amount will be put into an escrow and will not be  
11 released to either the debtor or to the landlord until such  
12 time as the parties either agree or the Court so orders.

13 MR. FREDERICKS: That's correct, Your Honor.

14 THE COURT: Okay. I think I understand that then.  
15 Any party wish to be heard in connection with that procedure  
16 with regard to Madison Waldorf?

17 (No audible response).

18 THE COURT: Okay, that will be -- for Item A then  
19 that will be approved.

20 MR. FREDERICKS: With respect to Item B, the  
21 objection of East Brunswick, we would propose to treat that one  
22 similarly.

23 THE COURT: All right. Any counsel here for East  
24 Brunswick? Mr. Gray?

25 MR. GRAY: Good afternoon, Your Honor. William Gray

1 for East Brunswick Video. Yes, we do agree to it. I have sent  
2 my comments about the order to Mr. Fredericks and we haven't  
3 yet resolved those. I would mention one quick thing that I was  
4 concerned about. The undisputed part, I assume and would argue  
5 that that undisputed part should be the difference between --  
6 excuse me, Your Honor -- the disputed part, that should be the  
7 difference between the undisputed and the amount that we have  
8 put in our objection to cure. We filed a statement that  
9 objected to the undisputed part, and so I believe that the  
10 disputed escrow would be the difference between those two  
11 figures.

12 THE COURT: I don't know what else it could possibly  
13 be.

14 MR. FREDERICKS: I think that's the way the order  
15 provides, Your Honor.

16 THE COURT: All right. It's got to be whatever you  
17 say it is and he says it is. To the extent you both agree,  
18 that's the undisputed part. To the extent you disagree, that's  
19 the disputed part.

20 MR. GRAY: Correct, correct.

21 THE COURT: Okay.

22 MR. GRAY: I didn't think the order was that clear on  
23 that.

24 THE COURT: Okay.

25 MR. GRAY: But, otherwise, the continuance to the



1 20th should be okay.

2 THE COURT: All right. Very good.

3 MR. FREDERICKS: With respect to this location, and I  
4 guess with respect to all the P.C. Richard & Son locations,  
5 there is one issue, Your Honor. P.C. Richard is prepared to  
6 close today and if we can get orders docketed today, and I'm  
7 not sure what the remaining language issues are, but we did  
8 bring redlines over to the Court to address these kind of  
9 issues with landlords. If P.C. Richards were to close today,  
10 it would result in approximately \$3.8 million coming into the  
11 estate today. They're here, they're prepared to close and so  
12 there is going to be one issue where one landlord may have an  
13 objection to that. So, I think we can deal with that later.  
14 But, I just wanted to advise the Court that we are going to try  
15 to get these particular orders for P.C. Richard to you today  
16 and we hope to have orders that are fully consensual. To the  
17 extent they're not, we'll certainly advise chambers of those  
18 particular issues that are in dispute.

19 THE COURT: All right. And let me advise counsel of  
20 just a potential problem is that we've had it on our website  
21 for some time now, we've noticed, everyone, that we're doing an  
22 upgrade to the ECF computer system this weekend, so the system  
23 goes down at five o'clock. There have been certain procedures  
24 that the Clerk's Office has implemented about closing out the  
25 day early today in order to accomplish that. If you can get to

1 me an order that I can sign by three o'clock today, I have no  
2 problem making sure that it gets docketed today.

3 MR. FREDERICKS: Okay. That would be our goal, Your  
4 Honor.

5 THE COURT: Okay.

6 MR. FREDERICKS: I appreciate the Court accommodating  
7 that for us.

8 THE COURT: Okay. So, we've taken care of then,  
9 Items A and B. Are both A and B orders that I'm going to be  
10 looking for, trying to get entered today?

11 MR. FREDERICKS: Let me just see. I'm not sure which  
12 location A relates to. I apologize for that, Your Honor.

13 THE COURT: B is one of them.

14 MR. FREDERICKS: So, then I believe, if it is matter  
15 A, I'll certainly advise the Court as soon as I figure that  
16 out. But, definitely with respect to matter B.

17 THE COURT: All right.

18 MR. FREDERICKS: With respect to matter C, which is  
19 the objection of 444 Connecticut Avenue, LLC, this is a P.C.  
20 Richard location, Store Number 3690. Again, we propose to  
21 treat the cure the same way as we previously described it.

22 THE COURT: All right. Does anyone wish to appear on  
23 behalf of 444 Connecticut Avenue?

24 (No audible response).

25 THE COURT: All right. That procedure will be

1 approved, as well.

2 MR. FREDERICKS: With respect to Matter D, which is  
3 the objection of Joe E. Tetters (phonetic). We propose to  
4 treat that particular objection the same way.

5 THE COURT: Is counsel here on behalf of Joe G.  
6 Tetter?

7 (No audible response).

8 THE COURT: All right, that procedure will be  
9 approved with regard to that location, as well.

10 MR. FREDERICKS: With respect to letter F, which is  
11 Walmart's cure objection. This is a credit bid, so I think  
12 that there will not be an escrowing. Ultimately, it will just  
13 be a determination of what the appropriate credit bid is and I  
14 can advise the Court that I've been in discussions with counsel  
15 for the landlord throughout yesterday and today. There may or  
16 may not be some significant issues to resolve, but we can  
17 certainly do so at the March 20th hearing subject to counsel's  
18 availability.

19 THE COURT: All right. So, we're not approving the  
20 assumption and assignment of this lease today, all we're doing  
21 is carrying it over until the 20th to determine the appropriate  
22 cure amount and then we'll deal with it, is that what you're  
23 proposing?

24 MR. FREDERICKS: I think -- yes, I mean, I think that  
25 we would still like to have -- yes, we can adjourn the whole

1 thing. I think that makes the most sense, Your Honor.

2 MR. HENDRICKS: Your Honor, if I may, Chuck Hendricks  
3 on behalf of Walmart Stores and Walmart Stores, Inc.

4 THE COURT: Yes, Mr. Hendricks. I approved your  
5 appearance today by telephone and you may proceed.

6 MR. HENDRICKS: Thank you, Your Honor. I'm advised  
7 by my client, and I know Mr. Fredericks has been negotiating  
8 with another attorney for the landlord on this matter, but I'm  
9 advised that the form that was sent by Mr. Fredericks this  
10 morning is acceptable to Walmart and I think it is a final cure  
11 amount credit bid and I don't believe there should be any  
12 further issues on that.

13 MR. FREDERICKS: With that, Your Honor, then I guess  
14 we would seek approval of it today and I guess based on that  
15 the objection would be resolved.

16 THE COURT: Okay, it will be approved.

17 MR. HENDRICKS: Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Hendricks.

19 MR. FREDERICKS: The next objection would be the  
20 objection of the Cameron Group Associates, letter I.

21 THE COURT: What are we doing with G?

22 MR. FREDERICKS: I'm sorry, G, I skipped over it, I  
23 apologize. The limited objection of -- I apologize that it  
24 doesn't say in the title either -- again with letter G, we  
25 propose to treat it the same way.

1 THE COURT: According to the docket you say you've  
2 resolved this matter with counsel.

3 MR. FREDERICKS: Oh, I apologize, Your Honor. Yes,  
4 this matter has been resolved. I do recall this one now.

5 THE COURT: Okay.

6 MR. FREDERICKS: Sorry for the confusion, Your Honor.

7 THE COURT: All right. So, the Court will note that  
8 that's been resolved. Okay.

9 MR. FREDERICKS: The next one, I guess, would be  
10 letter I, which is the Cameron Group Associates cure objection  
11 and we propose to treat this one the same way that we had  
12 treated the others. And obviously to the extent it's a  
13 landlord bid, there won't be an escrow, but we'll ultimately  
14 determine on what the appropriate credit bid amount should be.

15 THE COURT: All right, very good. Do you wish to be  
16 heard?

17 MR. WESTERMANN: Briefly, Your Honor, good afternoon.  
18 Robbie Westermann on behalf of the Cameron Group. I also have  
19 Mr. Andrew Brumbee (phonetic) on the phone who was admitted pro  
20 hac vice who's just listening in. Actually, I believe this is  
21 one where Best Buy was the successful bidder at the auction. I  
22 understand from the negotiations, we're very close on both the  
23 disputed and the undisputed cure amount figures, as well to the  
24 form of the proposed order. So, we are fine with approving the  
25 assumption and assignment and continuing the cure hearing to

1 next Friday.

2 THE COURT: All right, very good.

3 MR. WESTERMANN: Thank you.

4 THE COURT: So, the procedure will be approved as to  
5 Item I, as well.

6 MR. FREDERICKS: Yes, and as I recall, that order  
7 will differ slightly. The way that that -- and I thank you,  
8 counsel, for refreshing my memory -- with respect to that  
9 location, Best Buy had credit -- had bid the cure amount as  
10 ultimately determined by the Bankruptcy Court or the landlord.  
11 So, with that, I think the way that the order will work is Best  
12 Buy will be the one that will be paying an undisputed or  
13 disputed piece, but obviously to the extent they resolve it  
14 there will be no disputed piece. So, it won't be the debtors  
15 with that obligation, it will be Best Buy.

16 THE COURT: All right, very good.

17 MR. FREDERICKS: The next objection is that of  
18 Burbank Mall Associates. It's letter J.

19 THE COURT: Mr. Bliley?

20 MR. BLILEY: Good afternoon, Your Honor. Paul  
21 Bliley, I represent Burbank Mall Associates. The big issue  
22 here was we didn't know who the assignee was going to be,  
23 they're creating a new entity for that. I did e-mail them the  
24 information this morning. This is a credit bid, we objected to  
25 the cure amount, but since it's a credit bid, it's probably

1 moot. So, I think we can -- I think the order will be  
2 approved, and I don't think there's any reason to carry this  
3 over.

4 THE COURT: So, I should just enter this as moot?

5 MR. BLILEY: Well, I think the cure amount would be  
6 moot.

7 THE COURT: Your objection?

8 MR. BLILEY: Correct.

9 THE COURT: Okay.

10 MR. BLILEY: Your Honor, also, I did not file a  
11 formal objection of another client which is CC Investors, 1997-  
12 4, which is location 3343. The main objection we had there  
13 was, the way the auction was explained is that the debtor had  
14 the right to withdraw the bid anytime before today. The debtor  
15 hasn't done that. We could object today orally to the cure  
16 amount, but again, this is another credit bid amount I think  
17 that's going to be moot. I'm working on the order with the  
18 debtor, I don't think I'll have any problem. It's not on the  
19 docket, so there's no reason to carry it over, but I think it  
20 will be resolved.

21 THE COURT: All right, thank you, Mr. Bliley.

22 MR. BLILEY: Thank you, sir.

23 THE COURT: The Court's going to note that that's  
24 been resolved as moot.

25 MR. FREDERICKS: Okay. The next objection would be

1 letter K, which is 36 Monmouth Plaza, LLC.

2 MR. PETCHER: Rhett Petcher, Your Honor, Seyfarth  
3 Shaw for 36 Monmouth Plaza, LLC. I believe actually that  
4 during the early part of this hearing we reached an agreement  
5 in principal on both the order and the cure amounts, so I'm  
6 pretty sure that we're going -- that this objection is at this  
7 point moot because we will be entering an agreed order.

8 THE COURT: All right. So, you want to see it be  
9 resolved as moot.

10 MR. PETCHER: Thank you, Your Honor.

11 MR. FREDERICKS: Thank you, Your Honor. The next  
12 objection would be objection letter L. I apologize again,  
13 there's no entity name listed there. To the extent that it  
14 hasn't been resolved, Your Honor, and I apologize for just not  
15 having that information, we would propose adjourning it to the  
16 20th, we can certainly advise the Court if it has been resolved  
17 prior thereto or on the agenda for the hearing for the 20th.

18 THE COURT: I'm advised this is Carousel Center.

19 MR. FREDERICKS: I believe again this is a credit  
20 bid.

21 MR. MUELLER: That's correct.

22 (Off the record comments)

23 MR. MUELLER: Your Honor, Mike Mueller on behalf of  
24 Carousel Center Superstore. My co-counsel in New Jersey spoke  
25 with colleagues of Mr. Fredericks' this morning, and I believe



1 Mr. Fredericks. And we have some concerns about the language  
2 of the lease termination agreement and the order approving the  
3 lease termination agreement. We're going to make every effort  
4 to try and resolve that later this afternoon after this hearing  
5 and hopefully we'll have something to -- before the BOPS closes  
6 down.

7 THE COURT: All right.

8 MR. FREDERICKS: I guess, Your Honor, to the extent  
9 that we don't resolve this one, Your Honor, I would actually  
10 propose adjourning the whole hearing to the 20th on this one  
11 given that it's a lease termination.

12 THE COURT: All right. So, just so it's on the  
13 docket, I'll continue it to the 20th, but Mr. Mueller, if you  
14 would work it out today and we enter the order, then obviously  
15 it's taken off the docket, it doesn't need to go forward on the  
16 20th.

17 MR. MUELLER: Yes, sir, Your Honor. And we have no  
18 problem with putting it on the docket for the 20th.

19 THE COURT: All right, thank you.

20 MR. MUELLER: Thank you.

21 MR. FREDERICKS: Thank you. With that, Your Honor,  
22 that brings us up to letter N, which is, I believe we have  
23 adjourned letter M as in Michael. That brings us up to letter  
24 N, which is the Sea Properties I, LLC's objection.

25 MR. BENTLEY: Good afternoon, Your Honor. Darren

1 Bentley of Clement and Wheatley and we're representing Sea  
2 Properties I, LLC. I think it makes sense to continue that  
3 forward to the March 20th date and perhaps further out than  
4 that if our objection today doesn't moot the issue on the cure  
5 amounts. I would ask, however, since I have about a five-hour  
6 round trip drive that I be permitted to participate in that  
7 upcoming hearing telephonically if there's no objection on  
8 that.

9 MR. FREDERICKS: I mean I -- can you give us one  
10 second, Your Honor?

11 THE COURT: Yes.

12 (Off the record conversation)

13 MR. FREDERICKS: That's fine. All right, thank you,  
14 Your Honor. That works for us. There is one aspect of this,  
15 just so you know, that we will be going forward with later on  
16 in the auction or later on in the hearing or we can do it now.

17 THE COURT: As I understand it there was an objection  
18 about whether or not this particular --

19 MR. FREDERICKS: The auction was --

20 THE COURT: -- whether you had the right to remarket  
21 -- continue to market this property --

22 MR. FREDERICKS: Yes.

23 THE COURT: -- after the bid was rejected, and is  
24 that what you're asking needs to go forward later?

25 MR. FREDERICKS: Yes, Your Honor.

1 THE COURT: Okay. So, do you want to -- well, we'll  
2 come back to that after we go through all the rest and then  
3 we'll come up and address that issue.

4 MR. BENTLEY: Thank you, Your Honor.

5 MR. FREDERICKS: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. FREDERICKS: Letter O is the objection of Gateway  
8 Center Properties III. This is Location Number 3663. I  
9 believe that what we have agreed to with counsel is, we will  
10 continue to work with counsel on a form of assumption and  
11 assignment agreement and order and we will try to present that  
12 to the Court by Monday. This is a situation -- this is the  
13 lease that results in the largest net return to the estate, ten  
14 and a half million dollars. From the debtors' perspective, the  
15 debtors will work, obviously with the landlord and with Best  
16 Buy. But, to the extent that the parties cannot reach an  
17 agreement on a proposed form of order in an expeditious manner,  
18 we would propose being able to submit competing forms of order  
19 to the Court for consideration so that we can close on this  
20 location as quickly as possible and the estate can realize the  
21 consideration that Best Buys provide.

22 THE COURT: All right. And the competing form of  
23 order that you would be submitting would be much along the  
24 lines that you've outlined with regard to the others about  
25 escrowing any disputed portion of a cure amount?

1 MR. FREDERICKS: Yes, Your Honor, that's correct.

2 THE COURT: Okay, very good. Mr. Mueller?

3 MR. MUELLER: Good afternoon, Your Honor. Mike  
4 Mueller appearing on behalf of the landlords, Gateway Center  
5 Properties III, LLC and SMR Gateway III, LLC. Mr. Fredericks'  
6 representation to the Court is accurate, Your Honor. We are  
7 going to work in earnest to try and get the form of the order  
8 approving the assumption, and assignment and sale of the lease  
9 in acceptable form so that we can get the order to the Court as  
10 quickly as possible so that we can close and the estate can  
11 realize the ten and a half million dollars.

12 I will note in that regard, my co-counsel in New  
13 York, Mr. Kushnick with the law firm of Greenberg Traurig, who  
14 I believe is attending telephonically, sent to Mr. Fredericks  
15 and his colleagues revisions to the proposed order at 12:13  
16 this afternoon.

17 THE COURT: All right, very good.

18 MR. MUELLER: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Mueller. All right, so  
20 the Court then will then adjourn the hearing on the cure  
21 amounts to March 20 and will anticipate an agreed order as to  
22 language for assumption and assignment, and if there is no  
23 agreement we'll look for competing forms of the orders and then  
24 the Court will enter the one that it thinks is appropriate.

25 MR. FREDERICKS: Okay. And to assist the Court with

1 reviewing those orders what we'll do is submit a redline  
2 comparing the two orders so you can see where the differences  
3 are and obviously to the extent the Court has any questions, we  
4 would certainly make ourselves available to the Court at its  
5 convenience.

6 THE COURT: That would be most helpful. Thank you.

7 MR. FREDERICKS: Thank you, Your Honor. The next  
8 objection is letter O, which is Whitestone Development. This  
9 has similar --

10 THE COURT: This is Item P.

11 MR. FREDERICKS: -- I'm sorry, Item P. This has  
12 similar -- there are similar issues here, it's the same  
13 landlord. And the difference here is that P.C. Richard would  
14 like to -- and the debtors -- would like to close today. We've  
15 prepared to do so. The issue -- the primary issue here is that  
16 we would like to have the Court docket the order today, but at  
17 this point we have not seen counsel's comments to the form of  
18 order that was circulated early yesterday morning.

19 THE COURT: That's because you were in court  
20 apparently when you received them.

21 MR. FREDERICKS: I think they may have sent them  
22 while we've been in court. I haven't obviously checked my  
23 Blackberry, but as of 11:30 they had still not turned the  
24 document before we came over to court. I'm not sure exactly  
25 how the Court would like to proceed here. We would --

1 THE COURT: The Court would proceed the same way as  
2 the last one, if it's the same landlord -- well, I'll hear Mr.  
3 Mueller -- but, you know, if you can't agree on a form of the  
4 order, if you each submit your own with a blackline and get it  
5 to me, you know, by three o'clock this afternoon, I will do my  
6 best to get that docketed the way I need to get it later today.

7 MR. FREDERICKS: That would be acceptable to the  
8 debtors.

9 THE COURT: Mr. Mueller?

10 MR. MUELLER: Thank you, Your Honor. Good afternoon.  
11 Michael Mueller on behalf of the landlord. It's actually a  
12 different landlord, it's Whitestone Development Partners, LP.  
13 It just happens to be represented by the same counsel at  
14 Greenberg Traurig and Christian and Barton.

15 Your Honor, Mr. Fredericks is correct, we've been  
16 unable to agree on the language of the assumption and  
17 assignment and sale agreement and the order approving it.  
18 We've been working diligently to turn that around as quickly as  
19 possible. However, this landlord is a sophisticated client,  
20 they have their own in-house counsel, they have partners that  
21 have to look at it. We received the order Wednesday night, we  
22 reviewed it yesterday with our clients, all day yesterday, and  
23 I've been working on collating their comments and have been  
24 working as diligently as possible to get those comments, as I  
25 noted earlier, to Mr. Fredericks. We are going to make every

1 effort to try and resolve that by today because we understand  
2 that the purchaser would like to close P.C. Richard today, but  
3 it may not be possible if we're unable to agree on the form of  
4 the order. And we would ask for the Court's indulgence to  
5 submit that where we will make every effort to do so by three  
6 on a consensual basis today, but we would ask the Court's  
7 indulgence to do so, if necessary, at a date subsequent to  
8 three o'clock today. Again, we just got the order Wednesday  
9 night and we have been working in all haste to accomplish this.

10 THE COURT: Mr. Fredericks?

11 MR. BERKOWITZ: Good morning, Judge. Ted Berkowitz  
12 from Farrell Fritz in New York on behalf of, it's P.C. Richard  
13 & Son.

14 THE COURT: Okay.

15 MR. BERKOWITZ: Mr. Fredericks had a lot of fun with  
16 that name during the auction, had to say it over and over and  
17 over again.

18 MR. FREDERICKS: I think it may be Richard, but,  
19 because I've been told subsequently --

20 MR. BERKOWITZ: It was Richard in 1907. Judge, this  
21 is the problem. We've had the order and several other orders  
22 since Wednesday, as well. We've turned around our comments,  
23 we've looked at all the other landlords' comments, we've gotten  
24 our comments back to the debtor. This is \$3.3 million to the  
25 estate, which they could have today, accrue the interest,

1 invest it any way they want under 545. From our point of view,  
2 one of the things we bargained for was the ability to get in  
3 today. We want the keys, we want the codes. We have our  
4 workers ready to enter premises and start redoing the stores  
5 tomorrow. And, in fact, the reason why we paid so much for  
6 this location in particular is, we need to get in there and  
7 keep all of the Circuit City customers that were going to this  
8 location so that they could walk in and see another consumer  
9 electronics location. And every day that goes by, and now  
10 we're talking not about just today, we're talking about  
11 Saturday and Sunday, the two biggest selling days of the entire  
12 week. Of course, we're not going to sell right now, but every  
13 day that we're not in there are days we're going to lose. So,  
14 we need to close today so that we can get them the money and  
15 get our workers in there.

16 The issue is not between the assignee and the  
17 landlord, the issue is a cure issue between the debtor and the  
18 landlord. And so we'll look at their comments, but there has  
19 to be some mechanism upon which we can get an order effective  
20 today which would permit us to rely upon it, get them the money  
21 and they can give us the keys. The 3 p.m. deadline in my mind  
22 is not as important as the deadline upon which Your Honor is  
23 leaving for the weekend, because you can sign the order, the  
24 order may not get docketed until the ECF system gets back up  
25 and running, but it's effective really upon your signature.



1 So, I guess we need to know your availability so we need to  
2 know if we can get in a conference room over at McGuire and get  
3 this done today. Thank you.

4 THE COURT: Thank you. Mr. Mueller, we're talking  
5 about your objection is to the cure amount, as I read it. So,  
6 why can't there be a mechanism that can be put into place that  
7 reserves your rights with regard to cure amount, you know, that  
8 escrows it and takes care of it along the lines Mr. Fredericks  
9 has recited.

10 MR. MUELLER: Your Honor, I don't know that there  
11 can't be, and I would echo counsel's comments about perhaps  
12 there's a way we can submit the order after the three o'clock  
13 deadline, if necessary. The objection to the cure amount --

14 THE COURT: I'm not as confident as he is that that  
15 is effective if it's not docketed.

16 MR. MUELLER: Okay.

17 THE COURT: But, that's a different issue.

18 MR. MUELLER: I understand, Your Honor. You are  
19 correct that there is an objection to the cure amount and I  
20 have every confidence that we'll be able to work that out.  
21 When we filed the objection to the cure amount, we weren't  
22 aware that we were going to be unable to work out the language  
23 with respect to the proposed assumption and assignment  
24 agreement and the order approving the assumption and assignment  
25 agreement. We were still looking at our comments, we had no

1 idea whether those comments would be acceptable or rejected by  
2 debtors' counsel and counsel for P.C. Richard. And we're still  
3 working through that process. And in all candor and respect to  
4 the Court, Your Honor, one day is not a lot of time to go  
5 through a 25-page order that has substantive rights for our  
6 client and under due process concerns, we think we should be  
7 entitled to make sure that that order provides what we believe  
8 it should provide. We're a party to this proceeding and --

9 THE COURT: And I realize that, Mr. Mueller. But,  
10 you know, the Court's concern is, I mean, there's nothing  
11 unusual about this order, I mean, we've all seen these kinds of  
12 orders many, many times before. The Court's looked at the  
13 order, the form of the order. Nothing jumped out at me as  
14 being, you know, unusual about it. Now, I can understand  
15 parties wanting to negotiate language and that sort of thing,  
16 but that should be something that we should be able to resolve.  
17 And the big issue that you've raised in your objection as to  
18 the cure amount, I think that we can protect your client to  
19 make sure that you're totally protected and allow this to close  
20 today.

21 MR. MUELLER: I agree, Your Honor, with respect to  
22 the cure.

23 THE COURT: So, what I'm going to do on this one is  
24 I'm going to do exactly the same thing we did with the  
25 objection on O and that is that I'd like to get a consent order

1 between the two of you by three o'clock today. If I can't,  
2 then give me your version that you want me to enter and I'll  
3 look at Mr. Fredericks' order and Mr. Fredericks said he'd give  
4 me a blackline between the two and then I'll look at it and  
5 then I'll make a decision today so that we can get it closed  
6 today.

7 MR. MUELLER: Yes, sir, Your Honor. Thank you.

8 THE COURT: Thank you, Mr. Mueller.

9 MR. FREDERICKS: Thank you, Your Honor. We  
10 appreciate the Court's consideration in that regard.

11 I believe that brings us to the last objection, which  
12 is the objection of Union Square which is also represented by  
13 the same firm. We have, this is the situation where the  
14 landlord credit bid its cure amount plus cash consideration as  
15 a result of bidding at the auction and we have agreed to push  
16 this, similar to the Gateway Store, until Monday.

17 The issue with going beyond Monday from the debtors'  
18 perspective is that it only benefits the landlord to have this  
19 drag on any further, because every day that it drags on the  
20 landlord -- there is further administrative claims. We've  
21 asked the landlord to agree to consent that beyond Monday to  
22 waive any claims against the estate to the extent that this  
23 cannot be resolved by then. And the landlord has, at least  
24 prior to the hearing, my understanding was, denied that  
25 request. So, this would be a similar situation where we would

1 ask to try to work this out by Monday and in the event we  
2 cannot, submit the competing form of orders.

3 THE COURT: That would be fine. Mr. Mueller, do you  
4 want to be heard?

5 MR. MUELLER: Good afternoon, Your Honor. Mike  
6 Mueller on behalf of Union Square Retail Trust. Mr. Fredericks  
7 is right, we are going to endeavor to submit a consensual order  
8 by Monday.

9 THE COURT: Okay.

10 MR. MUELLER: And if we are unable to do so, we will  
11 submit competing orders as Your Honor suggests.

12 THE COURT: All right, very good. Thank you, Mr.  
13 Mueller.

14 MR. MUELLER: Thank you, Your Honor.

15 THE COURT: That procedure is acceptable to the  
16 Court.

17 MR. FREDERICKS: Okay. With that, Your Honor, I  
18 believe that concludes the objections. I'd like to inform the  
19 Court that we have resolved, that we have completely resolved,  
20 as far as form of order, agreement and the like, you know,  
21 approximately half of these particular bids. We are very close  
22 on almost all of the rest. I think there are about -- there  
23 are five maybe that are outstanding, including the three that  
24 relate to Mr. Mueller's clients. So, we are hopeful that we  
25 can get them over to you today before three, those that are

1 done. In the event we can't, we'll submit those on Monday.

2 THE COURT: All right, very good. And I understand  
3 we have one other matter we need to take up then, which is the  
4 Sea Properties I, LLC objection. I'm wondering if everybody  
5 else might want to be excused so they can go work on the form  
6 of the order so that we can get these in to me by three o'clock  
7 while we are taking up this matter. So, that if anybody wants  
8 to leave at this point to go and address those kinds of issues,  
9 you may do so.

10 (At this time some attorneys exit.)

11 THE COURT: All right. Sir, you may proceed on your  
12 objection. This is in relation to Sea Properties I. This is  
13 Objection N on the proposed agenda today.

14 MR. BENTLEY: Thank you, Your Honor. And as  
15 previously stated, my name is Darren Bentley of Clement and  
16 Wheatley and we represent Sea Properties I, LLC. Your Honor,  
17 this is a situation where my client, Sea Properties, is the  
18 landlord of a ground lease on a property located in  
19 Chesterfield, Virginia. It is a -- there is a building on top  
20 of that property that was put on their subsequent to the ground  
21 lease being entered into. My client is, of course, interested  
22 in getting the lease back and terminating that lease. And so  
23 on March 2nd, they did go ahead and submit a defensive bid in  
24 writing, Your Honor. And I have some documents, if there  
25 aren't objections from counsel, I'd like to get them put in as

1 evidence. And the first document I'd like to get put in as  
2 evidence is the bid, the written bid, that was submitted, Your  
3 Honor.

4 THE COURT: No objection. Okay, then the Court will  
5 receive it.

6 MR. BENTLEY: And I would move to have that marked as  
7 Exhibit A or whatever --

8 THE COURT: We'll, do it as Sea Properties Exhibit 1.

9 MR. BENTLEY: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. BENTLEY: And in that particular bid, Your Honor,  
12 we made a credit bid for the final cure amount, which as yet is  
13 undetermined, but we estimated at that time as being  
14 approximately \$56,745 as of the auction date of March 10th,  
15 2009. That's what we estimated that it would be, Your Honor.  
16 The following date, Your Honor, we received the statement of  
17 bids that was filed in the case that listed all of the  
18 properties for which bids had been received at that point, and  
19 ours was listed on that list. So, we followed up with contact  
20 to debtors' counsel to confirm that we were, in fact,  
21 considered a qualified bid on our lease, and we were told that  
22 we were, in fact, considered such. And I have some e-mails  
23 that I received from their law firm, and again, I'd like to  
24 submit them into evidence if there aren't any objections.

25 (Pause)

1 MR. FREDERICKS: No objection, Your Honor.

2 THE COURT: Okay, there being no objection, the Court  
3 will receive this as Sea Properties Exhibit Number 2.

4 MR. BENTLEY: And, Your Honor, just for the record,  
5 the first e-mail is a response to an e-mail from me. It's a  
6 response from Jessica Kumar at Skadden Arps on March 9th at  
7 6:20 p.m., and in her response to me she states that, "There  
8 are no other qualified bidders for Lease 805 at this time."

9 THE COURT: All right.

10 MR. BENTLEY: I'd also refer to the other e-mail, and  
11 it is a response to my request for information from Kellen  
12 Grant (phonetic), also at Skadden Arps. It's dated March 6th,  
13 2009 at 3:33 p.m. And in that response he states, "We have no  
14 other qualified bids on Location 805. There are no extensions  
15 pending. Your client is a qualified bidder."

16 Now, Your Honor, we looked carefully at the bidding  
17 procedure order that was entered on February 19. We also  
18 looked carefully at the supplemental order which basically  
19 pushed the bid deadline back to March 3rd, but it also had  
20 amended bidding procedures attached to that, that then became  
21 the effective bidding procedures for the case. And I think  
22 that's where the rub lies. Let me give you a little bit of the  
23 factual background on this.

24 So, we have a qualified bid out there. We contact  
25 counsel for Circuit City the date the prior to the sale to find

1 out if there's been any other qualified bid because we have not  
2 yet received adequate assurance documents and we had not  
3 received any notification of any other proposed bids. And we  
4 want to confirm we're the only bid out there and if that's the  
5 case, whether we can short circuit the sale process and get a  
6 termination prior to the auction. And the response is that,  
7 no, we're going to go ahead and proceed with the auction, there  
8 are no other bidders, you're the sole bidder, but we're going  
9 to proceed with the auction.

10 So, we employ counsel in New York over at Chadwin and  
11 Park and have them appear physically at the auction on the  
12 10th, and we also telephonically appear at that auction on the  
13 10th. And it was previously admitted as Exhibit A to this  
14 overall hearing today, but I suspect it would be a good idea to  
15 introduce it into this segment as an exhibit, as well, unless  
16 it's already a part of the larger case.

17 THE COURT: I assume the transcript is what you're  
18 talking about, or the exhibit?

19 MR. BENTLEY: The results from the lease auction, yes  
20 -- actually I'm referring to the results from the lease  
21 auction. I believe that was --

22 UNIDENTIFIED SPEAKER: Exhibit A.

23 MR. BENTLEY: -- Exhibit A.

24 THE COURT: Exhibit A. It's already an exhibit, so  
25 you can rely on Exhibit A.



1 MR. BENTLEY: Thank you, Your Honor. And then I  
2 would refer the Court to the third line item and the first line  
3 item, Your Honor. And we heard from Mr. Fredericks earlier on  
4 that the first line item, store location Number 232, at least  
5 this was my understanding and please correct me if I  
6 misunderstood what you stated, the San Mateo Superstore  
7 location, that lease was withdrawn prior to the auction. Okay,  
8 805, which is the lease that involves my client was withdrawn,  
9 but that was withdrawn after the hammer had fallen. Okay? And  
10 so unfortunately for my client, they are alone in this. They  
11 are the only lessor or landlord that had a lease, their bid  
12 rejected post-auction.

13 So, after the auction -- before we were aware of --  
14 before this had been posted, before Exhibit A had been posted  
15 on the website at KCC, we contacted them to ask them to send us  
16 a copy of the form, lease termination agreement, so we could  
17 review it and have our clients endorse it.

18 The first response back was, okay, we'll get it to  
19 you, but make sure you understand that it's not going to be  
20 final until the Court says it's going to be final. To which we  
21 responded, fine, that's great, go ahead and send it over to us  
22 so we can review it. Just shortly after that we got a second  
23 response that said, no, we're not going to send you a lease  
24 termination agreement, we're reviewing our options at this  
25 time.

1 Another day transpired, and then yesterday -- I  
2 believe it was yesterday -- I apologize, Your Honor -- two days  
3 ago we got confirmation from them in the evening that they  
4 were, in fact, not going to consider our bid, at all. So, in  
5 essence, they had rejected our bid post-auction, Your Honor.  
6 And in looking at the bidding procedures, a rejected bid is no  
7 bid at all, so we believe that this auction went through with  
8 no bid at all, which according to the bidding procedures means  
9 that they've got to go ahead and reject that lease.

10 I'm going to read some of the specific language from  
11 the amended bidding instructions, Your Honor. The first  
12 reference I would make, and I would ask the Court to take  
13 judicial notice of this document. This is the supplemental  
14 order under bankruptcy code. And I have a copy that I can  
15 provide to the Court.

16 MR. FREDERICKS: Your Honor, for the record, it's  
17 letter D of the related documents on the agenda. I don't know  
18 if the Court has a green binder, but --

19 THE COURT: I'll receive it.

20 MR. BENTLEY: And, Your Honor, the first remarks or  
21 sections I'm looking at are on Page 18 of the amended bidding  
22 instructions under the heading of, "Selection of Successful  
23 Bid." And, Your Honor, I'm relying upon that section and the  
24 definition of successful bid to indicate that my client, in  
25 fact, was the successful bidder.

1           We've heard Mr. Fredericks state that the Creditors  
2 Committee had a chance to look at it, DGM had a chance to look  
3 at it and they opened the bid stating that we had the highest  
4 and best offer. In fact, we had the sole offer. And so we  
5 were the successful bidder at that auction. And so that  
6 triggers the next thing, Your Honor, which is if the debtor is  
7 going to decide not to accept the successful bid and this is  
8 very broad and gives the debtors a great bit of latitude, which  
9 is understood in a Chapter 11 bankruptcy case, but once it was  
10 determined that we were a successful bidder, the only way they  
11 could change that was by rejecting our bid. And I'm looking  
12 now at Page 19, the first full paragraph, Your Honor.

13           THE COURT: And that's where it says they can reject  
14 it at any time prior to the entry of the order of this Court.

15           MR. BENTLEY: Correct, Your Honor. And then we're  
16 going down then to the last paragraph on that same page where  
17 it talks about sale hearings, and the last sentence that begins  
18 on Page 19 says that if the debtors do not receive any  
19 qualified bids for the March lease or leases by the March bid  
20 deadline, which they had pushed up on us to March 3rd, then the  
21 debtors will proceed with the rejection of such March lease.  
22 And that's the situation that we have here. It's unique  
23 because we were the only one that actually went all the way  
24 through with the auction and were a successful bidder. And the  
25 only way to get rid of a successful bid is to reject it. And

1 so when they at that point rejected our bid, there was no  
2 qualified bidder. And so they are now required to reject that  
3 lease, Your Honor, and that is the crux of the argument, Your  
4 Honor.

5           We've already been asked to jump through hoops like a  
6 circus dog on this thing, and now they're telling us that they  
7 want to continue marketing the property until I don't know  
8 when. I know there's an end date out there of June 8th that  
9 they have to do something by June 8th. But, we've already  
10 spent the money and gone through an entire auction process, and  
11 now they're asking us to spend the money and go through I don't  
12 know how many more auction processes. If the Court interprets  
13 this to mean that they can have 20 auctions on the same  
14 property and every time with a successful bidder they can say,  
15 nope, we don't like it, we're going to have another auction,  
16 we'll have yet another auction until -- and we're going to keep  
17 this up until June 8th. And that can't be the way that this  
18 order is set up, Your Honor.

19           I could understand if they would have said before the  
20 auction that, look, this is -- we can do better, this is not  
21 the highest and best bid that we can draw on this property,  
22 let's go ahead and continue the date for the auction, let's go  
23 ahead and extend the deadline for the bid on this. They had  
24 already rejected the vast majority of the properties at this  
25 point in time. They only had 22 or maybe 24 properties that

1 went to auction. They certainly could have with regard to the  
2 two that they withdrew the lease offers on, they certainly  
3 could have, on those two, moved the Court for a new auction  
4 date and set out a new proposed deadline for bids, but they  
5 didn't do so. And so once they went ahead and said, we're  
6 going forward with the auction, and once they called the  
7 auction and once the hammer fell, they had made a choice at  
8 that point. And their remaining options, once that had  
9 occurred, was to either accept our bid as the successful bid  
10 for whatever we had bid upon, or to reject it outright. And so  
11 that's what we're asking for the Court to enter an order, to  
12 sustain our objection on this matter and to order them to  
13 either go ahead and sustain our bid as being the successful bid  
14 and give us a lease termination agreement on the terms that  
15 were agreed upon when the hammer fell, or in the alternative,  
16 to reject our successful bid, there is no qualified bidder, and  
17 go ahead and reject that lease back to my client.

18 THE COURT: Your argument necessarily depends on the  
19 fact that if they reject a qualified bid, that then this  
20 language says that they've never received a qualified bid in  
21 the first place, but they did receive a qualified bid, they  
22 just decided to reject it.

23 MR. BENTLEY: Right, Your Honor. And what I'm saying  
24 is that, that can't be -- that interpretation can't be the  
25 right interpretation. To force us to jump through this hoop

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1 however -- if they want to have an auction every week, for  
2 example, just for sake of argument, if they wanted to have an  
3 auction every week and give us a short fuse on when to get our  
4 bids submitted, they could drag this out until June 8th the way  
5 that things are set up right now, and we could spend thousands  
6 upon thousands of dollars in this. And that's not economical  
7 and it certainly, at the end of the day, if there is a higher  
8 bidder, they're going to have to pay a whole bunch of more  
9 money on this in attorneys' fees and other costs that have been  
10 incurred pursuant to this lease.

11 THE COURT: But, then you'll be made whole at that  
12 point, right?

13 MR. BENTLEY: If that happens, Your Honor.  
14 Otherwise, we've got a property that's sitting right now, it's  
15 vacant, it's my understanding, the property needs -- something  
16 needs to be done with the property, it needs to be flipped. So  
17 there's not just a matter of what we're losing on the ground  
18 lease, there's a matter of the value of the property declining.

19 THE COURT: All right. Thank you, sir.

20 MR. BENTLEY: Thank you, Your Honor.

21 MR. FREDERICKS: Your Honor, this is probably a  
22 little bit unconventional, but I think it will help give the  
23 Court some context, and Mr. Avallone from DJM is still in the  
24 room. What I'd propose to do is call Mr. Avallone as a  
25 witness, reopen his testimony and address some of the factual

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1 matters that were addressed by counsel.

2 THE COURT: You may proceed.

3 MR. FREDERICKS: At this time the debtors would call  
4 Mr. Avallone.

5 JAMES AVALLONE, WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. FREDERICKS:

8 Q Good afternoon, Mr. Avallone.

9 A Good afternoon.

10 Q Can you just for the record state your name and spell your  
11 last name?

12 A Sure. My name is James Avallone. It's A-v as in Victor,  
13 a-l-l-o-n as in Nancy, e.

14 Q And by whom are you currently employed?

15 A DJM Realty Services, LLC.

16 Q And what is your title?

17 A Senior Managing Director.

18 Q And how have you been involved in the Circuit City lease  
19 marketing process?

20 A I've been the point of contact between the debtor and  
21 debtors' counsel and for the marketing of all of the Circuit  
22 City properties.

23 Q And in particular have you marketed what we'll refer to as  
24 Store Number 805?

25 A Yes, I have.

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1 Q And can you tell us a little bit about the lease  
2 associated with that store?

3 MR. BENTLEY: Your Honor, if I may, I would propose  
4 an objection to any -- to the relevance of any testimony as to  
5 the value of this particular property. We're talking about a  
6 mechanical situation. The value of the property I don't think  
7 is germane to the arguments that I've made, because the issue  
8 is really whether or not they followed the bidding procedures  
9 or not. They certainly had opportunities to do other things.  
10 But, as far as the value of the property or how it's been  
11 marketed, I don't think those are relevant at this point in  
12 time.

13 THE COURT: All right, thank you. The Court  
14 understands the objection to the relevance, but I think that  
15 the Court can certainly weigh that at the appropriate time and  
16 we'll allow the question.

17 MR. FREDERICKS: Can you repeat the question, is that  
18 possible? No, okay.

19 Q I think that the question was, have you marketed the --

20 A Background about the lease?

21 Q -- the lease, yes. Can you --

22 A Sure. This is a ground lease in Charlottesville,  
23 Virginia. If I can remember correctly, the building's 45,000  
24 and change square feet. They're paying approximately \$235,000  
25 a year on a ground lease that is approximately -- I'm guessing



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1 right now, I don't have it with me -- ten years old, or so. My  
2 understanding, there is also a purchase option that is part of  
3 this contract. So, the debtor feels, and in consultation with  
4 DJM, we feel that the offer that was submitted by the landlord  
5 is an inadequate offer for us to proceed to a termination.

6 Q In particular, with respect to the ground lease, is there  
7 a structure currently on that location?

8 A Correct.

9 Q And who -- do you know who put that structure --

10 A If it was a ground lease, and my assumption would be that  
11 Circuit City would have built the building and the landlord  
12 just owns the land.

13 MR. BENTLEY: I'm going to object to any assumptions,  
14 Your Honor.

15 THE COURT: Objection sustained.

16 Q With respect to the building and the ground lease, do you  
17 know whether or not at the end of the ground lease term, who  
18 the building goes to?

19 A I can only assume. I don't have a copy of the contract in  
20 front of me. Typically, in a ground lease, the building would  
21 revert back to the landowner.

22 Q And, Mr. Avallone, were you -- just give me one second.

23 MR. FREDERICKS: May I have one second, Your Honor?

24 (Pause)

25 MR. FREDERICKS: I don't believe I have any further

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1 questions for Mr. Avallone.

2 THE COURT: Okay, thank you. Any cross examination  
3 for this witness?

4 MR. BENTLEY: A couple questions if I may, Your  
5 Honor.

6 THE COURT: Yes, you may.

7 CROSS EXAMINATION

8 BY MR. BENTLEY:

9 Q Good afternoon, Mr. Avallone. It's my understanding, and  
10 correct me if I'm wrong, you had some involvement in  
11 determining the value of this property prior to the auction?

12 A Yes.

13 Q And you were in direct contact with counsel for Circuit  
14 City, is that correct?

15 A With respect to?

16 Q With respect to the value of the property.

17 A Correct.

18 Q Did you also have discussions -- you also had discussions  
19 pertaining to the value of the property with the Creditors'  
20 Committee or representatives from the Creditors' Committee?

21 A Indirectly.

22 Q Okay. And so prior to following through with the auction,  
23 you -- did you feel that our bid was inadequate at that time of  
24 the Sea Properties' bid was inadequate prior to the auction?

25 A Prior to the auction, we felt that your bid would not be a

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1 bid that we should accept and we should withdraw the property  
2 from the auction and not reject your bid.

3 Q But, you went through with the auction.

4 A But just withdraw -- we went through with the auction, but  
5 we withdrew your property from the auction.

6 Q You went through with the auction and the hammer fell on  
7 our bid?

8 A The hammer did not fall on your bid. We withdrew the  
9 property from the auction on your particular location.

10 Q Let me refer you back.

11 MR. BENTLEY: Do you have Exhibit A?

12 Q There were two properties that the lessees were withdrawn  
13 on, and testimony -- or argument earlier was that the lease was  
14 withdrawn prior to the auction on store location Number 232,  
15 which was the San Mateo Superstore.

16 A That was not withdrawn prior to, that was withdrawn during  
17 the auction.

18 Q Withdrawn during the auction before the hammer fell?

19 A The bids on that location were inadequate so we withdrew  
20 the property and did not move forward with the assignment or  
21 termination of that lease. We determined that the value was  
22 greater than what was -- than what we were receiving at the  
23 auction.

24 MR. BENTLEY: I have no further questions.

25 THE COURT: Thank you. Any follow up?

1 MR. FREDERICKS: No, Your Honor.

2 THE COURT: Does the Committee have any questions for  
3 this witness? Ms. Tavenner, do you wish to examine this  
4 witness?

5 MS. TAVENNER: No, Your Honor.

6 THE COURT: You may step down, sir.

7 THE WITNESS: Thank you.

8 MR. FREDERICKS: With that, Your Honor, I guess I  
9 would proceed to brief oral argument.

10 THE COURT: Can you direct the Court to where in the  
11 transcript that you handed up as Debtors' Exhibit Number B, the  
12 auction of this location occurs?

13 MR. FREDERICKS: Yes, Your Honor. It is on Page --  
14 what's Page Number 136 in the upper right-hand corner -- I'm  
15 sorry, Page Number 137 it starts.

16 THE COURT: Does Mr. Bentley have a copy of the  
17 transcript?

18 MR. BENTLEY: I do not, Your Honor. I have not yet  
19 seen a copy of the transcript. I assume that one's been  
20 created, but I have not yet seen it.

21 MR. FREDERICKS: Here you go.

22 MR. BENTLEY: Page 137?

23 MR. FREDERICKS: Yes. As the transcript will  
24 reflect, and it is, the lease was not withdrawn during the  
25 auction, contrary to Mr. Avallone's testimony. As the record

1 reflects, the bid was accepted, and this goes slightly to oral  
2 argument. The bid was accepted as the highest or otherwise  
3 best at the auction. There was a caveat put on the record  
4 there consistent with the bid procedures that the debtors  
5 reserve the right to reopen the auction, that the debtors  
6 reserve the right to not proceed with Court approval, and that  
7 the debtors -- and with that it was all consistent with their  
8 fiduciary duties in the best interest of their estates and  
9 after a consultation with the Committee. And, in fact, that  
10 particular reservation was put on the record with respect to  
11 every lease at the auction.

12 THE COURT: I've reviewed the transcript.

13 MR. FREDERICKS: After consulting with the Committee,  
14 and what you basically have here is a ground lease, and  
15 assuming the typical situations are correct, Circuit City  
16 constructed a building. Upon termination of this particular  
17 ground lease, the building, under typical situation would  
18 revert back to the landlord. I don't think they can contest  
19 that that's the situation. I apologize for not having the  
20 lease here, but I would assume that that would be the way that  
21 this would work. So, in this instance, what the landlord has  
22 done is they have credit bid some particular amount of  
23 arrearages and --

24 THE COURT: Approximately \$56,745.

25 MR. FREDERICKS: So, approximately \$56,745 have been

1 credit bid to receive a building and a ground lease. The  
2 bidding procedures couldn't be clearer in the fact that the  
3 debtors had the right to withdraw this particular location from  
4 the auction to reject the qualified bid in the event they  
5 didn't think it was in the best interest of their estate. I  
6 think that everything's clear in that respect.

7           What counsel's essentially asking this Court to do is  
8 to substitute a landlord's business judgment or pecuniary  
9 interest for that of the debtors and ask us -- and force us to  
10 reject a lease that can only be rejected either by operation of  
11 365(d)(4) or after a hearing on the debtor's business judgment  
12 that the lease should be rejected. Those are the standards  
13 under which a lease can be rejected.

14           Here, I'm not exactly sure why -- I understand the  
15 expenses counsel has incurred, they were made available and did  
16 actually participate by telephone. They had additional counsel  
17 there, that was not necessary in the debtors' regard.

18           In fact, the debtors have not told them they will  
19 hold an auction once a week. And what the debtors are going to  
20 do and this was going to be the subject of a separate -- most  
21 likely the subject of a separate motion is try to auction the  
22 lease or remarket it and auction it before the end of March.  
23 To the extent that the debtors cannot do so, the debtors will  
24 seek relief from their current order to market the lease beyond  
25 the end of March. But, under the way that the current

1 rejection procedures order works, if the lease isn't assumed  
2 and assigned, terminated or rejected prior to March 31st, it's  
3 deemed rejected as of March 31st.

4           So, essentially, what counsel's asking to do now is  
5 to cut off the remaining half of the month, allow us not to  
6 market the lease and try to auction it, get a windfall to the  
7 landlord, that they may ultimately get if we cannot locate  
8 somebody to purchase this lease. And to the extent we seek  
9 relief for my order, counsel can come here and be heard in that  
10 regard. But, we just don't think it's a situation here where  
11 the debtor should be compelled or even can be compelled to  
12 reject the lease that they have determined in their business  
13 judgment does not makes sense to reject at this particular  
14 time. Unless the Court has any questions.

15           THE COURT: Do you wish to address the argument that  
16 Mr. Bentley raised with regard to the language in the bid  
17 procedures that he says compels you to proceed to reject the  
18 lease if you don't receive a qualified bid.

19           MR. FREDERICKS: I don't -- which particular section  
20 of the bid -- I don't think there is a particular section that  
21 compels us to move forward with rejection.

22           THE COURT: The language Mr. Bentley's talking about  
23 is found on Page 19 of the procedures and it says if the  
24 debtors do not receive any qualified bids for the March lease  
25 or leases by the March bid deadline, the debtors will proceed

1 with rejection of such March leases as set forth in the sale  
2 motion.

3 MR. FREDERICKS: Again, Your Honor, I still think  
4 it's subject to the business judgment standard. And I'm not  
5 sure that there's been any evidence either one way or the other  
6 whether or not this would be in or not in the debtor's business  
7 judgment. I mean, I think ultimately I understand what the  
8 particular language says, I think it, you know -- but I don't  
9 think that the Court has an adequate record upon which to rule  
10 that the particular lease should be rejected as of today.

11 THE COURT: All right, thank you, sir.

12 MR. FREDERICKS: Thank you, Your Honor.

13 THE COURT: Ms. Tavenner, do you wish to be heard on  
14 this?

15 MS. TAVENNER: No, Your Honor.

16 THE COURT: All right, Mr. Bentley, you may reply.

17 MR. BENTLEY: Briefly, Your Honor. Your Honor, the  
18 debtors' statements in closing missed the point. We're not  
19 saying that they didn't have the ability to continue the  
20 auction out or have it at a different time or something like  
21 that. We're saying that once they decided to go forward with  
22 the auction, and once they sold it, once the hammer fell, they  
23 only had two available options. That's what we're saying.

24 We're in a situation where we had the successful bid  
25 and that successful bid was rejected, and that rejection is



1 what triggers the requirement that they now must also reject  
2 the lease. That's what we're talking about here.

3 He states that in response to our allegations or our  
4 assertions under Page 19 of the supplemental bidding or amended  
5 bidding procedures that he believes that that was subject to  
6 their business discretion as well, or business judgment, as  
7 well. And I would tell the Court, it's not. I mean if you  
8 look through the bidding procedures and the order itself, just  
9 about everything in there has a caveat that says subject to the  
10 business judgments of the debtor or in the sole discretion of  
11 the debtor. This particular does not. It's not in their  
12 discretion. They must reject. And so for those reasons, Your  
13 Honor, we would ask --

14 THE COURT: Where does it say that though? I mean,  
15 because I understand that that's your argument, but that's not  
16 really what this language says, is it?

17 MR. BENTLEY: It's not precisely what the language  
18 says, Your Honor. But, it can't be interpreted any other way.  
19 I don't see how it could be interpreted any other way. To  
20 interpret it any other way would permit them to, as I said and  
21 he's right, they haven't told me they're going to have an  
22 auction every week, but they certainly could. If that's the  
23 way that the Court understands this to read, then they can push  
24 the bid deadline. They can have as many auctions as they want  
25 and let the hammer fall as many times as they want and keep

1 doing it until they get something that they think is their --  
2 the "highest and best offer".

3 THE COURT: Okay. But, you don't dispute that they -  
4 - the debtor has the right to reject at any time --it says, in  
5 the bidding procedures, at any time prior to the entry of the  
6 order of this Court approving the bid, any bid in their sole  
7 discretion which they deem to be inadequate or insufficient.  
8 And that's because when we do these kinds of sales, the sales  
9 aren't final when the hammer falls at the auction, the sale is  
10 final when I approve it. And up until the time that I approve  
11 it, the sale is not final.

12 Now, then the question is, okay, well then what  
13 happens if either I don't approve it? Because they could  
14 submit it to me and I could say no, I'm not going to approve  
15 this bid even if Mr. Fredericks was right by your side saying  
16 yes I want you to approve it, Judge, I could say, no, I'm not  
17 going to approve this sale. And does that mean then under your  
18 theory that they would immediately have to reject this lease  
19 because I wouldn't let them approve a sale that I thought was  
20 inadequate?

21 MR. BENTLEY: Yeah, I believe that's the right  
22 reading of it, Your Honor. The way that this is crafted, I  
23 believe that's correct because --

24 THE COURT: But, let's look at the language.

25 MR. BENTLEY: Yes, Your Honor?

1 THE COURT: It says if the debtors do not receive any  
2 qualified bids, then they're going to proceed to reject it.  
3 But, they did receive a qualified bid, as you've argued. They  
4 received it and they rejected it, because they thought in their  
5 business judgement it was not adequate. And even if they had  
6 accepted it, this Court independently could say, that qualified  
7 bid is not acceptable and so then it's not. But, they did  
8 receive a qualified bid which then doesn't require them to  
9 proceed to the rest of the language of that sentence.

10 MR. BENTLEY: That's not my understanding. The way I  
11 looked at this, Your Honor, I don't see how it could be  
12 interpreted any other way but to require them to reject.  
13 Because they had -- in their sole discretion and in their  
14 business judgment they had the ability to, at any time prior to  
15 having the hammer fall, I agree with the Court, they had the  
16 ability to say, we're going to push the deadlines out, we're  
17 going to do whatever, we're going to take this bid off of the  
18 table, as they did for one of the other bids, I think it was  
19 232, the San Mateo store. I wouldn't be here today if they had  
20 done that with 805, but they didn't do that with 805. They  
21 opened it for bid, they had a bid, the hammer fell.

22 I'm saying that once the hammer fell, we've got a  
23 successful bid. You don't have a successful bid in any of the  
24 other leases. This is the only one where you have a successful  
25 bid, which forces them at that point if they don't like it,

1 they've got to reject it. And when they reject, which this is  
2 the only lease that they had to do that on, then --

3 THE COURT: Well, they could do two things. They  
4 could either reject it, or they could ask the Court to approve  
5 it.

6 MR. BENTLEY: Or they could ask the Court to approve  
7 it, correct, Your Honor.

8 THE COURT: And I could either approve it or  
9 disapprove it.

10 MR. BENTLEY: I agree. And if they had gone that  
11 route instead and you had denied it, then I think that they  
12 would have had other options.

13 THE COURT: Well, I don't understand why their  
14 rejection means that they don't have -- they didn't receive a  
15 qualified bid in the first place.

16 MR. BENTLEY: That's my understanding of this, Your  
17 Honor.

18 THE COURT: All right, thank you.

19 MR. BENTLEY: Thank you, Your Honor.

20 THE COURT: Mr. Fredericks, anything further?

21 MR. FREDERICKS: Yes. Very brief, Your Honor. I  
22 agree with you and I apologize, I was initially looking at a  
23 different provision. But, I would agree with the Court's  
24 interpretation of this particular language. The second part of  
25 the sentence only applies in the event the debtors did not

1 receive a qualified bid. In this particular circumstance the  
2 debtors acknowledge that this was a qualified bid and they,  
3 indeed, accepted it at the auction subject to rights to  
4 withdraw it. But, I don't believe this provision is even  
5 applicable here given that we did receive a qualified bid.

6 THE COURT: All right, thank you.

7 MR. FREDERICKS: Thank you, Your Honor.

8 THE COURT: All right. Mr. Bentley, I'm going to  
9 overrule your objection. I think that the language is clear  
10 that the debtor received a qualified bid in this case and  
11 they're not compelled by this language to proceed with  
12 rejection, whatever that means, unless they didn't receive a  
13 qualified bid.

14 And I would note for the record that even had they  
15 not received a qualified bid and they wanted to proceed with  
16 rejection, rejection is still subject to the approval of this  
17 Court and I would need to have evidence of the debtors'  
18 exercise of its business judgment before I would approve a  
19 rejection of the lease and I simply don't have that evidence  
20 here today. So, the Court's not going to compel that at this  
21 point in time. So the objection will be overruled, I'll ask,  
22 Mr. Fredericks, will you please prepare the order in that  
23 regard. Any questions regarding the Court's ruling?

24 MR. FREDERICKS: No, Your Honor. And we'll prepare  
25 the form of order.

1 THE COURT: All right. Thank you. Is there any  
2 other business we need to take up this afternoon, Mr.  
3 Fredericks?

4 MR. FREDERICKS: No, Your Honor. Thank you very much  
5 for the Court's indulgence. I apologize that the hearing did  
6 not go as smoothly as others. It's been a very hectic couple  
7 of days and --

8 THE COURT: I totally understand. It's probably  
9 going to be a very hectic hour and ten minutes if you can get  
10 me those orders that you've promised me for this afternoon.

11 MR. FREDERICKS: It is, and we will. Thank you, Your  
12 Honor.

13 \* \* \* \* \*

14 C E R T I F I C A T I O N

15 I, RITA BERGEN, court approved transcriber, certify  
16 that the foregoing is a correct transcript from the official  
17 electronic sound recording of the proceedings in the  
18 above-entitled matter, and to the best of my ability.

19  
20 /s/ Rita Bergen DATE: March 31, 2009  
21 RITA BERGEN  
22 J&J COURT TRANSCRIBERS, INC.

23  
24  
25 (CR)

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